UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

ALI SALEH KAHLAH AL-MARRI,
and MARK A. BERMAN, ESQ.,
as Next Friend,

Petitioner,

- vs -

C.T. HANFT, Commander, Naval Consolidated Brig, 1050 Remount Road, Charleston, South Carolina,

Respondents.

Docket No. 2-04-2257-26AJ

MEMORANDUM IN SUPPORT OF MOTION FOR UNMONITORED ATTORNEY-CLIENT MEETINGS AND CORRESPONDENCE BETWEEN PETITIONER AND COUNSEL

Petitioner Ali Saleh Kahlah al-Marri is a foreign national civilian who was designated as an "enemy combatant" by the President on June 23, 2003. Since that date, Petitioner has been held by the Military at the Consolidated Naval Brig in Hanahan, South Carolina. Prior to the Petitioner's designation as an "enemy combatant" he was represented by undersigned counsel in criminal proceedings in the Southern District of New York and in the Central District of Illinois. Despite his prior relationship with counsel, counsel has been denied access to the Petitioner for nearly 17 months. In June of 2004, the Supreme Court held in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2652 (2004), that one detained as an "enemy combatant" "unquestionably has the right to access to counsel in connection with the proceedings", brought to challenge

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that detention. Four months later, the government finally permitted counsel to meet with Petitioner. On October 14, 2004, counsel met with their client at the Consolidated Naval Brig. Their conference was electronically monitored and recorded and took place in the immediate presence of a Naval Judge Advocate ("JAG") and an unidentified member of the Brig staff. A representative of the Defense Intelligence Agency ("DIA") was present in an adjacent room monitoring the conference on television. In addition, all correspondence between Petitioner and counsel, and any notes created by, or information provided by Petitioner to, counsel would be subject to a post-meeting classification review by the government. Such monitoring and review procedures, which are a part of the conditions delineated in Special Administrative Measures ("SAMs) (attached as Exhibit A) counsel were required to sign before the government would permit them to meet with Mr. al-Marri, not only limit Petitioner's access to counsel but, at their core, destroy the possibility of effective representation by emasculating the attorney-client privilege.[1]

[1] As a matter of historical irony, between May 29, 2003, which is the last day counsel was permitted access to Mr. al-Marri, and June 23, 2003, the day on which Mr. al-Marri was designated an "enemy combatant" by President Bush, defense counsel was endeavoring to negotiate SAMs that would have allowed counsel unmonitored access to Mr. al-Marri, as had been the case from December 2001, when Mr. al-Marri was first arrested, and the date of his arraignment in Peoria, Illinois. Such unmonitored access was essential for counsel to be able to provide Mr. al-Marri effective assistance in the criminal prosecution then pending against him. Indeed, on the afternoon of Friday, June 20, 2003, defense counsel informed the government that, in order to obtain unmonitored access to Mr. al-

Petitioner now moves the Court to allow counsel unmonitored access to him. Such access is essential if Mr. al-Marri is to develop his habeas claims and, thereby, challenge his indefinite detention by the government, without charge. See Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) ("[A] necessary concomitant to the right of access [to the courts] is the right of access to counsel."). This same access-to-counsel issue was presented to the United States District for the District of Columbia, which recently held in a thoughtful and measured opinion that individuals being detained as enemy combatants have a right not only to be represented by counsel but, in addition, to have unmonitored meetings with their attorneys. See Al Odah v. United States, __ F. Supp. __, 2004 WL 2358254 (D.D.C. Oct. 20, 2004) (attached as Exhibit B). For the reasons set forth below, the Court should order the government to afford counsel unmonitored access to Mr. al-Marri.

ARGUMENT

I. PETITIONER HAS A RIGHT TO COUNSEL IN THESE HABEAS PROCEEDINGS.

In Rasul v. Bush, 124 S. Ct. 2686 (2004), the Supreme Court held that putative alien "enemy combatants" held at Guantánamo Bay are entitled to petition the federal courts for writs of habeas corpus, and that the federal courts have jurisdiction to entertain

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Marri to prepare for an upcoming suppression hearing and trial, counsel would be filing a motion on June 23, 2003 if the SAMs impasse could not be resolved.

those petitions. See id. at 2696-97 ("Considering that the [habeas] statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241."). Lawfully present, arrested, and then detained on American soil, Petitioner's right to seek habeas relief is undisputed and indisputable, notwithstanding that he is not an American citizen. See id. at 2698 n.15 ("holding that allegations of detention "without access to counsel and without being charged with any wrongdoing -- unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States") (emphasis added). Moreover, at the October 14, 2004 status conference, the government candidly admitted that it did not dispute that undersigned counsel have in the past and currently represent Petitioner al-Marri.

Indeed, it is really beyond cavil that Mr. al-Marri presently has a right to be represented by counsel in connection with the instant habeas proceedings challenging his detention as an enemy combatant. In Hamdi, supra, the petitioner asked the Court to hold that the Fourth Circuit had erred "by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney." The plurality of the Court held as follows:

> Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand.

124 S. Ct. at 2652. Justice Souter, who wrote a concurring opinion joined by Justice Ginsberg, stated that he would not have reached the constitutional issues addressed by the plurality, but made clear that he did not "disagree with the plurality's affirmation of Hamdi's right to counsel." Id. at 2660 (Souter, J., concurring). Thus, there were six justices who affirmatively held that Hamdi had a right to counsel in order to prosecute his habeas claim that he was being detained unlawfully by the government.[2]

As the district court held in Al Odah, supra, this Court also has the statutory authority to effectuate Petitioner's right to counsel in connection with these habeas proceedings. Although the habeas statute, 28 U.S.C. § 2241, does not expressly address the appointment of counsel, the Criminal Justice Act of 1964, 18 U.S.C. § 3006, permits the use of public funds to appoint counsel "[w]henever ... the court determines that the interests of justice so require," 18 U.S.C. § 3006A(a)(2), and specifically lists habeas cases as one of the circumstances in which the appointment of counsel is appropriate, 18 U.S.C. § 3006A(2)(B). Moreover, the All

[2] Justices Scalia and Stevens dissented on the grounds that Hamdi's detention was unlawful ab initio and, hence, did not address the question of whether he was entitled to counsel; they would have held that Hamdi was entitled to be released (as he recently was). See Hamdi, 124 S. Ct. at 2660-74.

Writs Act, 28 U.S.C. § 1651, authorizes the Court to fashion procedures to ensure that facts and legal issues underlying habeas actions are fully and fairly presented for consideration by the court. See Al Odah, 2004 WL 2358254, at *3-*4 (discussing Harris v. Nelson, 394 U.S. 286, 298 (1969) (holding that "a district court may, in an appropriate case, arrange for procedures which will allow development ... of the facts relevant to disposition of a habeas corpus petition.")).

In sum, Petitioner has an acknowledged right to counsel in connection with the current habeas proceedings. Moreover, the Court has statutory authority to appoint counsel in connection with non-frivolous litigation like the instant matter.[3] The critical issue then, discussed below, is whether such representation will be effectuated in an effective or an illusory manner.

II. PETITIONER HAS THE RIGHT TO UNMONITORED ACCESS TO COUNSEL

Prior to meeting with Petitioner on October 14, 2004, defense counsel were required to undergo comprehensive background investigations, the completion of which took over two months, in order to obtain "Top Secret" security clearances. A substantial portion of such investigations was devoted to assessing whether counsel are each patriotic American citizens, unaffiliated with any organizations that support the violent overthrow of the United

[3] Petitioner respectfully asks the Court to formally appoint present counsel -- who have been representing Petitioner on a pro bono basis -- under the CJA.

States government. Mr. Savage, Mr. Lustberg, and Mr. Berman were each granted "Top Secret" clearance and, thereafter, afforded access to the classified information filed by the government in this matter. In addition, counsel are, of course, members in good standing of various state and federal bars and have repeatedly sworn to defend and uphold the Constitution and laws of the United States of America. Nevertheless, the government has objected to providing counsel unmonitored access to Mr. al-Marri because of unsubstantiated concerns that counsel may wittingly or unwittingly disseminate sensitive national security information to al-Qaeda or others enemies of the United States.

The suggestion that counsel might purposely disclose sensitive information is not only insulting but, in addition, is belied by the extensive background investigations conducted, and security clearances granted, by the government. The possibility raised by the government in the Al Odah case that counsel might become the unwitting couriers of coded messages to al-Qaeda is, if deserving of serious consideration at all, insufficient to override Petitioner's right to a confidential attorney-client relationship. See id., 2004 WL 2358254, at *6-*7. However, the monitoring and review procedures upon which the government has insisted effectively convert counsel from Petitioner's advocates to the government's proxy interrogators. See Al Odah, 2004 WL 2358254, at *6 n.11 (noting that the government admitted that "it plans to

exploit the 'intelligence value' of monitoring Petitioners' conversations with counsel").

Nothing could be farther from the true role of counsel, whose relationship with clients has always been shielded by the attorney-client privilege, and who are ethically obligated not to disclose client confidences:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their client and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (internal citations omitted). See also Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); Fisher v. United States, 425 U.S. 391, 403 (1976) (recognizing that the purpose of the privilege is "to encourage clients to make full disclosure to their attorneys."). As the Supreme Court cases cited above make clear, at the very core of the attorney-client privilege is the principle that legal assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." Hunt v. Blackburn, 128 U.S. 464, 470 (1888). And, the Supreme Court has

recognized that government monitoring of attorney-client communications are particularly likely to, and will inevitably, obstruct and chill the attorney-client relationship. See Weatherford v. Bursey, 429 U.S. 545, 554 & n.4 (1977) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of fear of being overheard"); see also Al Odah, 2004 WL 2358254 at *8 (citing cases). Thus, the Supreme Court has "said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) (rejecting government effort to narrow applicability of attorney-client privilege and holding that it even survives client's death because "[w]ithout assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all ....") (citing Jaffee v. Redmond, 518 U.S. 1, 12 (1996) and Fisher v. United States, 425 U.S. 391, 403 (1976)).

Although the government has not yet filed a brief on the issue in this case, in Al Odah the district court concluded that the government was attempting "to erode this bedrock principle with a flimsy assemblage of cases and [reference to] one [Bureau of Prisons] regulation." Id. Ultimately, the right to due process upheld by the Supreme Court in Hamdi will prove to be illusory if

Petitioner is not afforded the threshold and most basic right of conferring with counsel in confidence, without fear that the government will utilize those conversations for its own purposes. For that very reason, the Supreme Court has held:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974) (citing Ex parte Hull, 312 U.S. 546 (1941)). Part and parcel of this right to counsel is the right to confer with counsel in confidence. See Bieregu v. Reno, 59 F.3d 1445, 1456 (3d Cir. 1995) (holding that "the right of court access guarantees the privacy of attorney-client communications"); Ching v. Lewis, 895 F.2d 608, 610 (9th Cir. 1990) (holding that "[t]he opportunity to communicate privately with an attorney is an important part of ... meaningful access [to the courts]," and that "a prisoner's right of access to the courts includes [confidential] contact visitation with his counsel."); Bach v. Illinois, 504 F.2d 1100 (7th Cir. 1974) ("An inmate's need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney

and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts.").

Moreover, as the district court proposed in Al Odah, there are less restrictive measures that the Court can impose which will accommodate the government's stated security concerns, as well as Petitioner's right to counsel, and which are acceptable to Petitioner in this case. In particular, Petitioner proposes the following framework for unmonitored attorney access:

1) Counsel will treat all information subject to the attorney-client privilege as confidential and will not disclose this information to any third party, except as provided below.

2) Prior to disclosing privileged information to any third party, counsel will submit such information to the government for classification review.

3) Privileged written communications, including counsel's notes and correspondence to and from Petitioner, will be treated as confidential, and submitted by counsel for classification review prior to disclosure to any third party.

4) All substantive court documents to be filed by counsel on Petitioner's behalf will be served on the government prior to filing with the Court so that it can perform a classification review before the documents are made accessible to the public.

5) Counsel will disclose to the government any information obtained involving future criminal conduct that threatens national security or involves immediate violence, as otherwise required by South Carolina Rule of Professional Conduct 1.6.

6) Counsel will not share with Petitioner classified information learned from other sources, except for classified information contained in the government's pleadings and submissions in this case as necessary to defend Petitioner.

7) Petitioner will be permitted to meet with Mr. Savage, Mr. Lustberg, and Mr. Berman at the same time, as he did on October 14, 2004.

8) All attorney-client mail will be marked "Attorney-Client Communication" and will be opened by one other than Petitioner, if at all, only in Petitioner's presence and in the presence of ranking Brig personnel.

9) Subject to these conditions, the government shall not monitor or review written or oral communications between Petitioner and counsel.

Under this framework, Petitioner respectfully asks the Court to direct the government to afford him unmonitored contact visits and written correspondence with his attorneys.

The government -- having unlawfully and unconstitutionally detained Petitioner without access to counsel for almost 17 months, and having usurped for itself the opportunity to interrogate Petitioner outside the presence of attorneys who had been vigorously defending him in federal court proceedings -- should not now be allowed to convert Petitioner's counsel into the military's inquisitors. The government's suggestion that counsel is incapable of safeguarding as privileged any and all information it obtains from Petitioner is unfounded, and offers an inadequate basis for subverting the attorney-client privilege.

CONCLUSION

Petitioner respectfully requests that the Court enter an order: 1) directing the government to allow counsel unmonitored access to Petitioner both in person and in written correspondence;

and 2) appointing the undersigned law firms to represent Petitioner pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Respectfully submitted,

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BY: _____
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October 27, 2004.

EXHIBIT A

PROCEDURES FOR COUNSEL ACCESS TO ALI SALEH KAHLAH AL-MARRI AT THE NAVAL CONSOLIDATED BRIG, CHARLESTON, SOUTH CAROLINA

I. Applicability

The following procedures shall govern access to Ali Saleh Kahlah Al-Marri ("the detainee"), while the detainee is in the control of the Department of Defense ("DOD") at the Naval Consolidated Brig, Charleston, South Carolina ("Brig") by counsel for purposes of habeas corpus or other litigation.

II. Definitions

A. Communications: All forms of communication between counsel and the detainee, including oral, written, electronic, or by any other means.

B. Counsel: An attorney who is employed or retained by or on behalf of the detainee for purposes of representing the detainee in habeas corpus or other litigation in federal court in the United States and who is admitted, either generally or pro hac vice, in the jurisdiction where the habeas petition or other litigation is pending. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. Detainee: An individual detained by DoD as an enemy combatant at the Brig.

D. Privilege Team: A team comprised of one or more DOD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any court, military commission, or combatant status tribunal proceedings concerning the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

III. Requirements for Access to and Communication with the Detainee

A. Security Clearance:

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).

2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DOD verification of the security clearance.

B. Acknowledgement of and Compliance with Access Procedures

EXHIBIT A

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.

2. The affirmation will not be considered an acknowledgement by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.

3. The DoD expects that the counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. The attorney is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation stating their agreement to comply fully with these procedures, prior to those individuals being utilized by the attorney.

4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

C. Verification of Representation

1. Prior to being permitted access to the detainee, counsel must provide DOD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number.

2. After meeting with the detainee, counsel must provide DOD with an *Acknowledgement of Representation*. This document must be signed by the detainee and must specifically state that the detainee is being represented in habeas or other federal litigation by counsel named in the Acknowledgement.

3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.

4. Counsel must provide DoD with a signed representation stating that (a) to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Commander, Fleet Forces Command (CFFC), any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the

detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoD will contact counsel with the date and duration of the meeting.

2. Legal visits shall take place in a room designated by CFFC. No more than one attorney and one interpreter/translator shall visit with a detainee at one time, unless approved by CFFC.

3. Due to the mission and location of the Brig, certain logistical details will need to be coordinated by counsel prior to arrival. Specific information regarding these issues will be provided by CFFC.

IV. Decision to Monitor Counsel Visits And Communications

A. When appropriate, DoD will monitor communications between the detainee and counsel to protect U.S. national security interests without compromising attorney-detainee privileged communications. Communications solely between counsel and/or translators/interpreters will not be monitored.

B. CFFC or his designee may approve monitoring communications pursuant to these procedures.

C. Monitoring shall only be approved following an individualized assessment of the national security implications of unmonitored communications between a detainee and his counsel or agents.

D. Prior to ordering monitoring of the attorney-detainee communications, the approval authority must conclude that it is reasonably necessary to protect against the disclosure of information that reasonably could be expected to result in immediate and substantial harm to the national security, including, but not limited to, communications regarding:

1. The facilitation of terrorist operations or future terrorist acts;

2. Military plans, weapons systems, or operations;

3. Foreign government information;

4. Foreign relations or foreign activities of the United States, including confidential sources;

5. Intelligence activities (including special activities), intelligence sources or methods, or cryptology;

6. Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security, which includes defense against transnational terrorism;

7. Matters that are classified above the clearance level of the counsel.

8. Brig force protection capabilities and procedures (including Brig security procedures, measures, or capabilities).

E. This written determination will remain valid, unless otherwise noted in the determination, for all subsequent communications between a given detainee and his counsel, unless and until it is rescinded by CFFC or his designee or higher authority.

F. To ensure that any attorney-detainee privileged communications are not compromised, monitoring will be conducted by a DoD privilege team. Except as provided herein, the privilege team shall not disseminate information derived from monitored communications.

V. Monitoring of Counsel Visits And Communications

A. When authorized under these procedures, the privilege team will monitor oral communications in real time between counsel and the detainee during any meetings.

1. These communications will be recorded in their entirety by audio and/or video recording devices.

2. Video recordings may be retained by the Brig—notwithstanding the prohibition against non-privilege team members having access to records of monitored conversations—provided that the recordings do not include audio.

3. Audio recordings may be retained by the Brig only as provided for herein.

B. The privilege team may terminate the meeting immediately if, at any time, the team determines that the detainee or counsel are:

1. Attempting to defeat or frustrate the monitoring of communications through the use of low-volume conversation, codes or discussions in a language other than previously agreed upon; or

2. Conveying information in furtherance of terrorist or other criminal operations or that reasonably could be expected to result in immediate and substantial harm to the national security or force protection, as determined by CFFC or his designee under these procedures.

C. To the extent the detainee divulges information to counsel that the privilege team identifies as classified, the privilege team may immediately terminate the meeting if:

1. Any discussion of such classified information is outside counsel's pre-cleared classification level, or is not related to counsel's representation of the detainee.

2. Counsel discloses any classified information to the detainee (other than information that the counsel obtained from the detainee), or if counsel discloses to the detainee that the Government has classified any information at any particular classification level.

D. The privilege team may monitor all written materials brought into or out of the meeting by counsel or counsel's staff, including notes, drawings or other writings created by counsel and/or the detainee during or prior to meetings to determine whether any such communications convey information that reasonably could be expected to result in immediate and substantial harm to the national security or force protection, as determined by CFFC or his designee under these procedures.

E. The privilege team may also monitor mail between the counsel and the detainee to determine whether any monitored communications convey information that reasonably could be expected to result in immediate and substantial harm to the national security, as determined by CFFC or his designee under these procedures.

VI. Classification Review of Legal Mail

A. In order to ensure the proper handling of classified information, the privilege team may review mail between counsel and the detainee to determine its appropriate security classification.

B. The cover sheet or envelope of any such mail shall include the annotation "Attorney-Detainee materials."

C. After analysis and approval, if appropriate, the detainee's incoming legal mail will be sealed and forwarded to the appropriate Brig staff section for delivery to the detainee, and the detainee's outgoing legal mail will be sealed and forwarded to the detainee's counsel.

D. The privilege team will forward the detainee's legal mail after a review and analysis period not to exceed:

a. Five (5) business days for legal mail that is written in the English language;

b. Ten (10) business days for any legal mail that includes writing in any language other than English, to allow for translation;

c. Thirty (30) business days for any legal mail where the privilege team has reason to believe that a code was used, to allow for further analysis.

E. Legal mail may be retained by the Brig only as provided for herein.

VII. Classification Review of Materials Brought Into or Out of the Meeting by Counsel

A. In order to ensure the proper handling of classified information, the privilege team may review all written materials brought into or out of the meeting by counsel or counsel's staff, including notes, drawings or other writings created by counsel and/or the detainee during or prior to meetings to determine their appropriate security classification.

B. After review by the privilege team, counsel may provide the detainee with court papers or other legal or related documents pertaining to his case, provided they do not contain any classified information.

C. Security personnel will directly receive and distribute all materials passed between counsel and the detainee during their meeting.

D. Copies of any documents counsel desires to leave with the detainee following the meeting must be provided to CFFC at least three business days in advance. Counsel shall annotate on the cover sheet or forwarding envelope the words "Attorney-Detainee Documents."

E. These materials may be retained by the Brig only as provided for herein.

VIII. Telephonic Access to Detainee

A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to the CFFC.

B. Any telephonic access will be subject to appropriate security procedures, including contemporaneous monitoring and recording by the privilege team, under the same conditions as in-person counsel visits.

IX. Retention of Monitored Communication Materials

A. The privilege team will retain custody of any monitored communications that convey information that reasonably could be expected to result in immediate and substantial harm to the national security or force protection, as determined by CFFC or his designee.

B. The privilege team will redact classified information that is outside the counsel's pre-cleared classification level or is not reasonably related to litigation.

C. No copies of any other portions of monitored communications will be retained.

X. Disclosure of Monitored Communications

A. No information derived from monitored communications will be disclosed outside the privilege team until after the privilege team has reviewed it for security and intelligence purposes.

B. In addition to terminating meetings or retaining written materials, if the privilege team determines that monitored communications convey information that reasonably could be expected to result in immediate and substantial harm to national security or force protection it will promptly report that information to CFFC. If CFFC concurs in that assessment, he may disseminate the relevant portions of the monitored communications to law enforcement, military, and intelligence officials as appropriate.

C. If, at any time, CFFC determines that monitored communications relate to imminent acts of violence, the contents of those communications may be disclosed immediately to law enforcement, military, and intelligence officials.

D. Except as authorized by section C above, monitored communications will not be disclosed to any Government personnel involved in court, military commission, or enemy combatant status proceedings involving the detainee.

XI. Counsel's Handling and Dissemination of Information from the Detainee

A. Counsel may disseminate the unclassified contents of the detainee's communications for the purpose of preparing for or conducting litigation involving the detainee. Any such dissemination shall be made solely by counsel, not by counsel's staff or any third parties.

B. Counsel may not divulge classified information provided by the detainee or related to his case to anyone except United States government personnel with the requisite security clearance and need to know, using a secure means of communication. As soon as possible after reviewing monitored communications or conducting classified review of materials, the DoD privilege team will advise counsel of the classification levels of any classified information disclosed during the communication. All classified material must be handled, transported and stored in a secure manner in accordance with US government requirements for handling, transporting and storing such information. Until classification review is completed by the privilege team, all communications with the detainee, including oral communications, must be treated as classified information.

XII. Naval Consolidated Brig, Charleston, South Carolina, Security Procedures

A. Counsel and translators/interpreters shall comply with all Brig security regulations, as well as the following specific security procedures and force protection safeguards and any supplemental procedures implemented by Brig personnel.

B. Upon arrival at Naval Weapons Station, Charleston, South Carolina, counsel will proceed to the Naval Weapons Station Pass Office (Building 302) for escorted transport to the Brig. When counsel arrives at the Brig Entry Control Point, the sentry will verify his identity with a government issued photo ID and by reference to the approved visitor's list. At this point, counsel will be met by a Brig representative and escorted to Receiving and Release.

C. Contraband is not permitted in the Brig and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs,

and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Brig Commanding Officer.

D. Photography or recording of any type is prohibited without the prior approval of the Commanding Officer. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops and related equipment are prohibited in or near the Brig. Should any of these devices be inadvertently taken into a prohibited area, the device must be surrendered to Brig staff and purged of all information.

E. Upon arrival at Receiving and Release, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.

F. Security personnel will directly receive and distribute all materials passed between counsel and the detainee during their meeting.

G. Following the meeting, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons. Counsel will then meet with the privilege team to discuss the classification levels of information disclosed during the meeting and to turn over any written materials created during the meeting for screening.

Agreement to Comply with Access Procedures

The undersigned hereby acknowledges receipt of these procedures and agrees, by his/her signature, to comply fully with all such procedures. This agreement will not be considered an acknowledgement by the counsel that the procedures are legally permissible. This signed acknowledgement will be provided at least five business days prior to the first scheduled meeting or communication with the detainee. CFFC will maintain the original of the signed acknowledgement and agreement.

Acknowledged and Agreed:

Signature

10/11/04
Date

Andrew John Savage III
Print Name

Attorney
Position

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29401

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Detainee: ALI JALEH KAHLAH AL-MARRI

EXHIBIT B

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Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.

Fawzi Khalid Abdullah Fahad **AL ODAH**, et al., Petitioners,
v.
UNITED STATES of America, et al., Respondents.

No. CIV.A. 02-828(CKK).

Oct. 20, 2004.

MEMORANDUM OPINION

KOLLARKOTELLY, District J.

*1 Presently before the Court is Petitioners' challenge to the United States Government's procedures regulating access of attorneys to individuals detained at the Guantanamo Bay Naval Base. This Memorandum Opinion and Order addresses the procedures as they apply to Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi. [FN1] Petitioners are three Kuwaiti nationals who have been detained since shortly after the September 11, 2001, terrorist attacks, and counsel working on their behalf have filed what are, in essence, petitions for writs of habeas corpus and ancillary claims. At this point, the focus of the litigation is on the habeas petitions. The Supreme Court held in *Rasul v. Bush*, 542 U.S. ___, 124 S.Ct. 2686 (2004), that this Court has jurisdiction to consider Petitioners' claims.

> FN1. The remaining Petitioners in this suit have been allowed access to counsel without real time monitoring.

Petitioners and the Government now dispute whether the three Petitioners may have access to counsel while pursuing their claims, and what limitations the Government can place on communications between the detainees and their counsel. The Government has agreed to permit meetings between the attorneys and the detainees, but subject to procedures which Petitioners argue are improper, including the audio and video real time monitoring of attorney-detainee meetings and a post hoc "classification review" of any notes taken during those meetings and legal mail between counsel and detainees. The Court now considers two narrow but crucial questions: first, whether the detainees are entitled to counsel as they pursue their claims, and second, whether the proposed monitoring and review procedures are allowable as they apply to these three detainees.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the wake of the September 11, 2001, terrorist attacks, the United States Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. 107-40, § § 1-2, 115 Stat. 224. The President subsequently deployed U.S. Armed Forces into Afghanistan to wage a military campaign against Al Qaeda and the Taliban regime. In the course of this campaign, several hundred individuals were captured and transported to the United States Naval Base at Guantanamo Bay, Cuba. Included amongst these individuals were twelve Kuwaitis, who in 2002 filed the instant suit seeking to be informed of the charges against them, to be allowed to meet with counsel and with their families, and to have access to the courts or another impartial tribunal. Ultimately, in *Rasul*, the Supreme Court's ruling clarified that the detainees were entitled to pursue their claims in federal court. *See generally Rasul*, 124 S.Ct. 2696.

The inquiry has now turned to whether the detainees are entitled to the assistance of attorneys in this process. On July 23, 2004, this Court set out a briefing schedule requiring the Government to file with the Court "all proposed procedures with respect to access to counsel that the Government intends to apply to the Guantanamo Bay detainees and to Petitioners in this case" and "which proposed procedures will apply to each Petitioner, including proposed monitoring of any of Petitioners' conversations with counsel." *Al Odah v. United States*, No. 02-828 at 1 (D.D.C. July 23, 2004) (scheduling order). Specifically, the Court ordered the Government to address "the legal merits of the Government's entitlement to monitor any of Petitioners' conversations with counsel." *Id.*

*2 In its response to the Court's Order of July 23, 2004, the Government took the position that, while the detainees would be permitted to meet with counsel, they had no right to representation,

EXHIBIT B

constitutional or otherwise, as they pursued their claims in federal court. Resp'ts Resp. to Compl. ("Gov't Resp.") at 2, 923. On July 30, 2004, the Government provided a set of "Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba," which include, *inter alia*, "[w]hen authorized under these procedures, the privilege team [FN2] will monitor [and record] oral communications in real time between counsel and the detainee during any meetings," and a system of "classification review," whereby the privilege team will "review all written materials brought into or out of the meeting by counsel ... including notes ... created by counsel and/or detainee during or prior to meetings to determine their appropriate security classification." *Id.* Ex. A (Procedures for Counsel Access to Detainees, filed July 30, 2004) at 3-7. The real time monitoring of attorney-detainee meetings would only apply to certain designated detainees, while the other access procedures would apply to all detainees. [FN3] The Government subsequently provided guidelines for implementing the proposed procedures. *See* Gov't Notice of Supp. Counsel Access Procedures ("Gov't Supp. Procedures") (filed September 29, 2004).

FN2. The "privilege team" is designed to be a neutral body "comprised of one or more [Department of Defense] attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any court, military commission or combatant status tribunal proceedings concerning the detainee." Gov't Resp. Ex. A at 1.

FN3. The attorney access procedures also require counsel to receive the appropriate security clearances, require detainees to sign acknowledgments of representation after meeting with their attorneys, allow the Government to conduct a "classification review" of legal mail between counsel and detainees, limit telephonic access to detainees, and allow the privilege team to retain monitored communications. Gov't Resp. Ex. A. at 1- 7. Furthermore, in the event that the privilege team learns information it believes "reasonably could be expected to result in immediate and substantial harm to the national security," the access procedures allow the privilege team to disclose information about monitored communications to the Commander of JTF-Guantanamo, who in turn "may disseminate the relevant portions of the monitored communications to law enforcement, military and intelligence officials." *Id.* at 7. The procedures also allow counsel to disseminate unclassified communications from the detainees for litigation purposes, but may not divulge any classified information except under limited circumstances. *Id.* at 8. Finally, the procedures require counsel to agree to generally follow the security procedures and safeguards for the Guantanamo Bay naval base. *Id.* at 1, 8-9. These remaining issues as they relate to other detainees will be resolved at a later date.

The Government indicated that three of the detainees in this case, Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi, would be subject to the real time monitoring of their meetings with counsel. Gov't Resp. Ex. B (Lucenti Decl.). This determination was made by Brigadier General Martin Lucenti, Sr., who is the Acting Commander of the Joint Task Force Guantanamo Bay, Cuba. Brigadier General Lucenti has stated that "[i]n approving the access procedures and in applying them to the specific detainees ..., [he] weighed the national security implications of allowing unmonitored access of these detainees to their counsel, in light of the specific intelligence information known from and about these detainees ...." *Id.* Ex. B at 4. The Court has been informed that these three individuals are currently the only detainees who will be subject to the real time monitoring of their conversations with counsel, and the Government has supplied Brigadier General Lucenti's explanation of why these three individuals should be treated differently than the other detainees. *See id.* Ex. B at 6- 10. [FN4]

FN4. Brigadier General Lucenti has stated that there is a particular concern that these three detainees would "attempt to use their [unknowing] counsel to engage in communications that would facilitate terrorist acts." Gov't Resp. Ex. B at 6. Specifically, Brigadier General Lucenti states that Petitioner al Kandari may have "served as a spiritual advisor to Usama bin Laden," and "[h]e is clearly a well-trained member of the al Qaida network with significant influence" who "has exhibited counter-interrogation methods that reveal his training by al Qaida." *Id.* Ex. B at 8. Of Petitioner al Odah, Brigadier General

> Lucenti states that he has admitted to having "Taliban connections and has admitted to being a member of al Qaida," he is "believed to be connected to Usama bin Laden's bodyguards," and that "al Odah's ability to communicate effectively with his comrades and leadership is not substantially reduced by the fact that he has been in detention." *Id.* Ex. B at 9. Finally, Brigadier General Lucenti states that during interrogation, Petitioner al Mutairi "has expressed his anti-American views and his desire to engage in terrorist and other violent activity against Americans," he "has an extensive history of violent assaults on detention facility personnel," and he "has demonstrated extensive knowledge of counter-interrogation techniques ." *Id.* Ex. B at 10. For these three individuals, Brigadier General Lucenti expresses his belief that they "will attempt to further terrorist operations or otherwise disclose information that will cause immediate and substantial harm to national security if [they are] granted unmonitored communications with ... counsel." *Id.* Ex. B at 8-10.

On August 16, 2004, this Court held a hearing to address the limited issue of monitoring attorney-Petitioner meetings, and the Government's intention to undertake a classification review of notes taken during those meetings and of legal mail sent between the attorneys and the detainees.

II. DISCUSSION

Although there are a number of proposed Procedures for Counsel Access to Detainees that will bear on the detainees held at Guantanamo Bay, the Court has confined its present inquiry to the attorney access issues that uniquely affect the three named Petitioners in this case. [FN5] Accordingly, the Court considers whether the Government can impose real time monitoring on the three Petitioners. In order to make this determination, the Court first considers what entitlement the detainees have to representation by counsel while pursuing their claims in federal court. The Court then considers whether, in light of this first determination, the Government can encroach on the detainees' relationship with counsel by subjecting them to real time monitoring of their meetings, and post hoc classification review of meeting notes.

> FN5. Pursuant to the United States District Court for the District of Columbia's September 15, 2004, Resolution of the Executive Session, the judges on this District Court determined that all cases pertaining to detainees held at Guantanamo Bay would be transferred to Senior Judge Joyce Hens Green for coordination and management. The judges have arranged that, as a general rule, Judge Green will rule on all procedural issues, while the original assigned judge may rule on substantive matters pertaining to the specific case at issue. With respect to substantive matters that are common to some or all of the Guantanamo detainee cases, Judge Green and the transferring judges will determine which judge shall make the initial ruling on these issues.

***3** The Court finds that Petitioners are entitled to be represented by counsel pursuant to the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651. In light of this finding, the Court determines that the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them.

A. Petitioners are Entitled to be Represented by Counsel

The Government argues that Petitioners have no right to counsel, under either the Constitution or any treaties or statutes. The core of the Government's position is that, in the absence of a right to counsel, any relationship they have with their attorneys is at the Government's pleasure and discretion, which in turn entitles the Government to place what limits it sees fit on that relationship. *See generally* Gov't Resp. After examining the parties' arguments, the Court determines that Petitioners are in fact entitled to be represented by counsel under the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651.

Although the Government devotes a wide swath of briefing to the question of whether Petitioners have a constitutional right to counsel, *see* Gov't Resp. at 9-21, the Court resolves the question of Petitioners' access to counsel by considering several statutes. [FN6] Of course, the Court is mindful of the "fundamental rule of judicial restraint," that requires it to refrain from ruling on questions of constitutional law "in advance of the necessity of deciding them."

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984); *see also Harris v. McRae*, 448 U.S. 297, 306-7 (1980) (indicating that the courts should make decisions based on statutes rather than the Constitution when possible).

> FN6. Parties spar over the meaning of footnote 15 in the Supreme Court's decision in *Rasul*. *See* Gov't Resp. at 16 n. 6; Pet'rs Opp. at 8; Gov't Reply at 6 n. 1. The footnote states:
> Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing-- unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."
> *Rasul*, 124 S.Ct. at 2698 n. 15 (citation omitted). Since the Court is able to resolve this matter without considering the constitutional questions, the Court declines to referee the parties' dispute over whether the Supreme Court's language was intended to identify a constitutional right to counsel.

The Supreme Court's holding in *Rasul* has made it clear that this Court has jurisdiction to consider Petitioners' "habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base" brought under 28 U.S.C. § 2241, as well as Petitioners' claims brought under 28 U.S.C. § 1331, the federal question statute, and 28 U.S.C. § 1350, the Alien Tort Statute. [FN7] *Rasul*, 124 S.Ct. at 2692-99. In *Rasul*, the Supreme Court stated that "Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more." *Id.* at 2698 (citation omitted). Consequently, the Court held that " § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention ...." *Id.*

> FN7. After the Supreme Court's decision in *Rasul*, the Government raised a question of whether the United States District Court for the District of Columbia is the proper forum for the resolution of a petitioner's claims in another suit brought by a detainee, *Gherebi v. Bush*, No. 04-1164 (D.D.C. filed July 12, 2004). Judge Green ruled on this question, finding that the Supreme Court's ruling in *Rasul* "makes it clear that this Court is the appropriate forum for the resolution of the Guantanamo Bay detainee cases," because the Supreme Court found that the United States courts have jurisdiction over the cases, and then determined that remand of the cases to the District of Columbia was appropriate. *Gherebi v. Bush*, No. 04-1164 at 8-9 (D.D.C. September 29, 2004) (ruling on proper forum).

The case law surrounding both the federal habeas statute, 28 U.S.C. § 2241, and the analogous state habeas statute, 28 U.S.C. § 2254, as well as the All Writs Act, 28 U.S.C. § 1651, permits this Court to fashion procedures by analogy to existing procedures, in aid of the Court's jurisdiction and in order to develop a factual record as necessary for the Court to make a decision on the merits of Petitioners' habeas claims. In addition to the authority to issue writs of habeas corpus under 28 U.S.C. § 2241, the All Writs Act states that the courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Court's decision to grant an order under the All Writs Act is "within the sound discretion of the court." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). In reaching its conclusion, the Court considers the Supreme Court's decision in *Harris v. Nelson*, 394 U.S. 286 (1969), in which the Supreme Court held that "a district court may, in an appropriate case, arrange for procedures which will allow development ... of the facts relevant to disposition of a habeas corpus petition." *Id.* at 298.

***4** The Supreme Court reasoned in *Harris*, that "[p]etitioners in habeas corpus proceedings ... are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Id.* at 299. The Supreme Court noted that, although Congress has clearly charged the courts with the duty to consider the facts of habeas petitions, Congress has been "largely silent" on the details of how this should be done. *Id.* Accordingly, the Supreme Court held that "[c]learly ... the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is

the inescapable obligation of the courts," and the courts' authority to fashion these procedures is "expressly confirmed in the All Writs Act, 28 U.S.C § 1651." *Id.* Relying on the All Writs Act, the Supreme Court explained that "when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held," the court "may issue such writs and take or authorize such proceedings with respect to development ... of the facts relevant to the claims advanced by the parties, as may be 'necessary or appropriate in aid of [its jurisdiction] ... and agreeable to the usages and principles of law." ' *Id.* at 300 (citation omitted).

It is clear then, that Petitioners are entitled to present the facts surrounding their confinement to the Court. It is equally clear that the Court is authorized to craft the procedures necessary to make this possible, in order that the Court might fully consider Petitioners' challenge to their detention. *See* *Harris*, 394 U.S. at 300 ("Obviously ... the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law." '). This encompasses the authority to appoint counsel to represent habeas petitioners. The habeas statute, 28 U.S.C. § 2241, does not specifically address the appointment of counsel. [FN8] However, the Criminal Justice Act, 18 U.S.C. § 3006, permits the use of public funds to appoint counsel "[w]henever ... the court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2). The Criminal Justice Act specifically contemplates the appointment of counsel in the habeas context, listing it as one of several circumstances in which representation may be provided. [FN9] *See* 18 U.S.C. § 3006A(a)(2)(B) (including both federal habeas actions under 28 U.S.C. § 2241 and state habeas actions under 28 U.S .C. § 2254). Although Petitioners' habeas claims have been brought pursuant to the federal habeas statute, the Court also notes that Rule 8 of the Rules Governing § 2254 Cases authorizes appointment of counsel pursuant to the Criminal Justice Act at any stage of the habeas proceedings. *See* R. Governing § 2254 Cases 8.

FN8. If the federal habeas corpus statute did address the issue of appointment of counsel, the Court would not be in a position to look to the All Writs Act. *See* *Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985) ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.").

FN9. The Government argues that the Criminal Justice Act is inapplicable to these proceedings because Petitioners "are not being held on criminal charges," and consequently the Act "cannot serve as a source of authority for any right to counsel here." Gov't Reply at 8. The Court is unpersuaded by the Government's argument, because it misconstrues the manner in which the Criminal Justice Act applies to the case at bar. The Court has not found that Petitioners' entitlement to counsel is grounded in the dictates of Criminal Justice Act; rather, the Court, acting pursuant to its discretionary authority to fashion procedures in aid of its jurisdiction over habeas actions, finds that the Criminal Justice Act provides a useful and persuasive procedural approach with which to inform its decision regarding representation by counsel for Petitioners.
The Government cites to a case from the Eleventh Circuit, *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir.1986), in which that court indicated that the Criminal Justice Act "provide for the appointment of counsel in *criminal* proceedings or in those proceedings 'intimately related to the criminal process." ' *Id.* at 1480 (citation omitted). However, the Government's reliance on this nonbinding case is misplaced. As a number of subsequent cases have pointed out, *Perez-Perez* relies on a narrow reading of a portion of the statute that has since been amended. *See, e.g.*, *Chamblin v. INS*, 176 F.Supp.2d 99, 104 (D.N.H.2000); *Saldina v. Thornburg*, 775 F.Supp. 507, 509 (D.Conn.1991). The 1986 amendment removed the term "collateral relief," on which the analysis in *Perez-Perez* relied, and "Congress did not insert any qualification on the scope of section 3006A(a)(2)(B). As noted by *Saldina*, the reliance of the *Perez-Perez* decision on a term that is no longer included in the statute 'logically restricts application' of the case." *Chamblin*, 176 F.Supp.2d at 104 (citing *Saldina*, 775 F.Supp. at 509).

***5** Again by analogy to state habeas proceedings, the Court looks to the Eighth Circuit's decision in

Battle v. Armontrout, 902 F.2d 701 (8th Cir.1990). In that case, the Eighth Circuit considered several factors in determining whether a habeas petitioner was entitled to be represented by counsel. The court considered whether the petitioner's claim was "nonfrivolous," and "whether the nature of the litigation will make the appointment of counsel of benefit to the litigant and the court." *Id.* at 702. The court found that in order to make these determinations, it was necessary to consider "the pro se litigant's ability to investigate facts and present claims," as well as "the complexity of the factual and legal issues" raised by the petition. *Id.* The court ultimately determined that the district court should have appointed counsel because the petitioner's ability to investigate the facts surrounding his detention was "seriously impaired by his incarceration," and "the factual and legal issues [were] sufficiently complex" that counsel was necessary "to develop [petitioner's] arguments and focus the court's analysis." *Id.*

Applying the Eighth Circuit's reasoning, this Court finds that Petitioners in the instant case have clearly presented a nonfrivolous claim. They have been detained virtually incommunicado for nearly three years without being charged with any crime. To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel.

The Supreme Court has found that Petitioners have the right to bring their claims before this Court, and this Court finds that Petitioners cannot be expected to exercise this right without the assistance of counsel. Although as the Government maintains, the habeas statute may not confer an absolute right to counsel, *see* Govt' Reply at 8, the law provides this Court with the discretionary authority to have counsel represent Petitioners in the habeas context. Therefore, the Court, in its discretion and pursuant to this authority, finds that Petitioners are entitled to counsel, in order to properly litigate the habeas petitions presently before the Court and in the interest of justice.

B. The Government May Not Abrogate the Attorney-Client Privilege

Having determined that Petitioners are entitled to representation while pursuing their claims, the Court turns now to the Government's intention to impose limitations on Petitioners' relationship with counsel. Specifically, the Court addresses the Government's proposed real time monitoring of Petitioners' meetings with their attorneys, and the Government's intention to review attorney notes [FN10] taken during these meetings and legal mail sent between the attorneys and detainees. After considering the Government's proposed procedures in light of their impact on the attorney-client relationship, the Court finds that the Government's proposed procedures inappropriately burden that relationship, and that national security considerations can be addressed in other ways.

> FN10. The parties have not discussed at any length the notes that Petitioners themselves may take. However, to the extent that meeting notes include both the attorneys' notes and those of Petitioners, the Court determines that they should be treated in the same manner.

***6** The Government proposes to engage in real time monitoring of meetings between the three detainees and their counsel, and to conduct a "classification review" of any written materials brought into or out of these meetings and of the detainees' legal mail. The Government's proposed real time monitoring would include, *inter alia*, audio and/or video recording of the meetings in their entirety, and would entitle the privilege team to terminate a meeting at any time if the team were to find that the detainee or attorney were "attempting to defeat or frustrate the monitoring of communications" or were "[c]onveying information in furtherance of terrorist or other criminal operations or that reasonably could be expected to result in immediate and substantial harm to the national security." Gov't Resp. Ex. A at 5. The classification review, designed to "ensure the proper handling of classified information [and] determine its appropriate security classification," would allow the privilege team to "review all written materials brought into or out of the meeting by counsel or counsel's staff, including notes, drawings or other writings created by counsel and/or the detainee." *Id.* Ex. A at 6. Counsel would also be required to provide

the privilege team with copies of any documents they want to leave with the detainee 14 days prior to the meeting, and would be required to allow the privilege team to review any legal or court papers prior to sharing these with the detainee. Gov't Supp. Procedures Ex. C at 1. The Government also proposes to conduct a classification review of all legal mail between counsel and detainees. Gov't Resp. Ex. A at 6.

As a justification for this monitoring and classification review, the Government's briefs raise a number of concerns centering around national security. As a general matter, the Government argues that in order to protect the national security, it needs the opportunity to classify information to which counsel have access in the course of Petitioners' representation. The Government does not express concern that the attorneys are rogues who might intentionally undermine national security interests. Rather, the Government is concerned that allowing counsel unmonitored access to these three detainees would enable them to "pass sensitive information about military detention facilities, the security at such facilities, or other military operations, including specific circumstances of capture to other terrorists through unwitting intermediary attorneys--something that members (and presumably supporters) of terrorists organizations are trained to do." Gov't Resp. at 27. The Government is concerned that the detainees may possess classified information, that the attorneys might learn and then disclose to others, potentially resulting "in immediate and substantial harm to national security." *Id.* The Government's concern also travels in the other direction, considering the possibility that the "attorneys may disclose--perhaps even unknowingly--sensitive and classified information to detainees, who could then pass the information on to other detainees as well as to terrorists outside of United States custody." [FN11] *Id.*

> FN11. Although the Government was careful to omit this from their briefs, at the August 16, 2004, hearing the Government also indicated that it plans to exploit the "intelligence value" of monitoring Petitioners' conversations with counsel. Tr. of August 16, 2004, Hearing at 67-70 (Government: "[T]here could be important intelligence insights derived from these communications that would not be derived from the interrogations that have occurred thus far .... I don't understand why the court would think that problematic if the information is not going to be used to test the legality of their detention.").

*7 The Government's base-line position that it "is permitting access [to counsel], subject to conditions," does not serve to inform the Court's analysis because the Court has found that Petitioners' access to attorneys is not a matter of Government discretion. Gov't Resp. at 23. Consequently, the Court's argument that the conditions it seeks to impose "should be considered reasonable *per se* " is inapposite. *Id.* at 24. Leaving this aside, the Government argues that its "procedures governing counsel access are more than reasonable and permit petitioners to obtain assistance of counsel in this habeas proceeding, while still maintaining essential national security protections." *Id.*

The Court finds that the Government's position is both thinly supported and fails to fully consider the nature of the attorney-client privilege. The Government has not presented the Court with law sufficient to sustain their proposed inroads into Petitioners' relationship with their attorneys. The privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system in the United States. The Supreme Court has stated that

> [t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (internal citation omitted).

Indeed, the "privilege 'is founded upon the necessity, in the interests and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." ' *Id.* (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). The privacy of communications between attorney and client is crucial to this relationship. *See, e.g., Mann v. Reynolds*, 46 F.3d 1055, 1061 (1995) (invalidating prison policy preventing contact visits between inmates and attorneys because prison "policies will not be upheld if they unnecessarily

abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access." (quoting *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir.1990)); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir.1974) ("An inmate's need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts."); *Adams v. Carlson*, 488 F.2d 619, 631 (7th Cir.1973) (recognizing "that the effective protection of access to counsel requires that the traditional privacy of the lawyer-client relationship be implemented in the prison context."). [FN12]

> FN12. The Government argues that these cases can be distinguished from the instant litigation because the cases deal with criminal defendants at trial or post-conviction, and that Petitioners are not entitled to the same constitutional protections as a criminal defendant. Gov't Reply at 13- 15. However, the case law indicates that where the client has been afforded the right to meaningful access to the courts, this right cannot be abridged, and that the ability to communicate in private with counsel is a crucial part of that meaningful access. *See Mann*, 46 F.3d at 1061; *Ching*, 895 F.2d at 609; *Bach*, 504 F.2d at 1102. In the instant case, Petitioners have been afforded access to the courts, which must necessarily be meaningful, and this meaningful access includes the opportunity to consult with counsel in private.

***8** Furthermore, the courts have protected an attorney's notes taken in the course of representation. The Supreme Court has rejected attempts by the Internal Revenue Service to obtain "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties," noting that "it is essential that a lawyer work with a certain degree of privacy," and that if discovery of the material was allowed "much of what is now put down in writing would remain unwritten .... Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice .... And the interests of the clients and the cause of justice would be poorly served." *Upjohn*, 449 U.S. at 397-98 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

The Government's proposal that it monitor these meetings and conduct a classification review of meeting notes flies in the face of the foundational principle of the attorney-client privilege. In fact, the courts have found that intrusion by the government, in particular, would lay waste to the value of the attorney-client privilege. *See Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4 (1977) (noting that the "fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping."); *United States v. DiDomenico*, 78 F.3d 294, 299 (7th Cir.1996) (presenting a hypothetical where the government records conversations between criminal defendants and their lawyers without turning the recordings over to the prosecution, and remarking that the practice would "greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations ... would make the defendants reluctant to make candid disclosures.").

In proportion to the importance granted the attorney-client privilege, the District of Columbia Circuit Court takes the strictest position on its waiver. This Circuit utilizes the traditional approach that any disclosure of privileged material works a waiver of the privilege. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C.Cir.1989) ("The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost even if the disclosure is inadvertent." (citations omitted)).

The Government attempts to erode this bedrock principle with a flimsy assemblage of cases and one regulation. The Government presents no case law, nor any statutory basis indicating that monitoring of attorney-client communications is permissible. Instead, the Government cites to various cases and a Bureau of Prisons regulation that do not support their proposed procedures. The Government relies on the district court decision in *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002), another case dealing with a detainee at Guantanamo Bay, for the proposition that "there is no reason that military personnel cannot monitor Padilla's contacts with

counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla." *Id.* at 604; Gov't Resp. at 24-26. However, this case does not have the force of law, because its holdings were later reversed, *see* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir.2003); *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004), and in any event, this portion of the district court's opinion was pure dicta and contained virtually no analysis in support of this statement.[FN13]

> FN13. The other cases the Government cites are similarly unpersuasive, because they are inapplicable to the Government's proposal to monitor attorney-client meetings. For instance, *United States v. Bin Laden*, 58 F.Supp.2d 113, 118 (S.D.N.Y.1999), held that the court had the authority to compel a defense attorney to obtain a Department of Justice security clearance before permitting access to classified materials. The Second Circuit in *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir.2000), held that a prisoner's isolation from the general population was reasonably related to prison security concerns, despite the detainee's argument that his isolation prevented him from preparing his own defense. The court in *El-Hage* was not faced with any type of monitoring, and in fact, the decision cites to *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir.1998), in which the Second Circuit upheld a restriction, "including a virtual ban on communications with others, *aside from ... Felipe's attorney* ...." *Id.* (emphasis added). In *Massey v. Wheeler*, 221 F.3d 1030 (7th Cir.2000), the Seventh Circuit upheld the denial of a prisoner's request for unusually frequent unmonitored phone calls with his attorney, because the prisoner had no pending court dates or visits from attorneys, and only sparse legal mail, and federal regulations only prohibited limitations on unmonitored phone calls to an attorney when the prisoner could demonstrate that correspondence, phone calls and visits were insufficient.

*9 The only example produced by Government specifically addressing the possibility of monitoring attorney-client meetings is a Bureau of Prisons Regulation, 28 C.F.R. § 501.3, [FN14] which was cited briefly in *Padilla*, 233 F.Supp.2d at 604. This regulation authorizes the director of the Bureau of Prisons to implement special administrative measures where there is a "reasonable suspicion ... that a particular inmate may use communications with attorneys ... to further or facilitate acts of terrorism ...." 28 C.F.R. § 501.3(d). The director may "provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys ... who are traditionally covered by the attorney-client privilege ...." *Id.* The only case addressing even tangentially the monitoring feature of this regulation is *Al-Owhali v. Ashcroft*, 279 F.Supp.2d 13 (D.D.C.2003), in which Judge Reggie B. Walton of this Court found that the prisoner did not have standing to challenge the monitoring provision. Therefore, there is no case law considering the propriety of this regulation, and the mere fact that such a regulation exists is not, itself, sufficient to persuade the Court that such monitoring is proper.

> FN14. The Government does not argue that this regulation is being applied to Petitioners, so the propriety of this regulation is not for the Court to decide. Rather, the Government presents this regulation as an example of monitoring attorney-prisoner communications.

The Court is acutely aware of the delicate balance that must be struck when weighing the importance of national security against the rights of the individual. However, the Government has supplied only the most slender legal support for its argument, which cannot withstand the weight of the authority surrounding the importance of the attorney-client privilege.

In response to the Government's legitimate national security concerns, the Court proposed a specific framework for counsel access at the August 16, 2004, hearing, which would allow counsel to meet with Petitioners unmonitored. *See* Tr. of August 16, 2004, Hearing at 14-18. Counsel for Petitioners have agreed to work within this proposed framework, even while recognizing the significant limitations it places on them if they want to have unmonitored communications with their clients.[FN15] *Id.* at 44. The Government was unwilling to concede that this proposed framework would fully address its national security concerns, but did not indicate why this proposal would be insufficient, except for unsubstantiated speculation that the attorneys would fail to follow the proposed system. *Id.* at 25-27, 30.

> FN15. The Court notes that counsel for Petitioner Habib, *see Habib v. Bush*, No. 02-1130 (D.D.C. filed June 10, 2002), also

> agreed that the Court's proposal was reasonable and that he would accept the Court's proposed framework. *See* Tr. of August 16, 2004, Hearing at 54-55.

This framework would allow for one attorney to meet with each Petitioner, and the attorney-client privilege would cover their communications. *Id.* at 14. The attorney would be required to treat all information subject to the attorney-client privilege as confidential, and would not disclose this information to anyone. *Id.* In the event that the attorney wanted to disclose the information to anyone, including law firm colleagues or support staff, counsel would have to agree to the Government's proposed classification review, and would have to abide by the Government's decision to approve or prohibit the disclosure, if based on properly asserted national security concerns. [FN16] *Id.* Although the Court set out its framework at the hearing as a possible way to allow counsel to have unmonitored meetings with Petitioners, at this stage the Court shall consider the attorneys' notes taken during those meetings and legal mail between counsel and Petitioners under the same rubric. If counsel agree to treat all these written communications as confidential, and to submit the written communications for classification review in the event that the individual attorney wants to disclose the information to anyone, the Court shall consider them covered by the attorney-client privilege, and exempt from review under the proposed framework. [FN17]

> FN16. The only possible exception to this rule would be court filings. Tr. of August 16, 2004, Hearing at 14. The Court recognizes that the parties and the Court would need to discuss what procedures would be followed for court filings, and whether counsel can include the information at issue in filings under seal and/or *in camera* without submitting them for a classification review.

> FN17. The Court notes that counsel for Petitioners and the Government would need to have significant discussions surrounding the securing and transportation of notes taken during the meetings.

*10 The Court's framework also proposed a protective order, consistent with the District of Columbia Rules of Professional Conduct, requiring counsel to disclose to the Government any information from the detainee involving future events that threaten national security or involve immediate violence. *Id.* at 15. The attorney-client privilege does not cover the intention to commit a crime, and under the District of Columbia Rules of Professional Conduct counsel would be permitted to disclose any information gleaned in the course of their representation about future threats to national security to the Court. *See* D.C.R. Prof'l Conduct 1.6(c)(1) ("A lawyer may reveal client confidences and secrets, to the extent reasonably necessary ... [t]o prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm ...."); *see also* D.C.R. Prof'l Conduct 1.6(d)(2) ("A lawyer may use or reveal client confidences or secrets ... [w]hen ... required by law or court order ....").

Counsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources. *Id.* The Court pointed out that the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be trusted with information at that level of clearance. *Id.* at 16. Furthermore, any attorney granted the clearance would receive appropriate training with respect to the handling of classified information, commensurate with the level of clearance granted and the type of classified material to which the attorney would be expected to have access. *Id.* The Court also indicated that there are significant statutory sanctions relating to the misuse or disclosure of classified information. *Id.* at 17; *see, e.g.*, 18 U.S.C. § 793 (addressing sanctions for gathering, transmitting or losing defense information); 18 U.S.C. § 798 (addressing sanctions for disclosure of classified information). Finally, the Court's framework presupposes full compliance by Petitioners' counsel.

With respect to the three Petitioners, the Court finds that the Government's national security concerns can be addressed by the framework the Court proposed at the August 16, 2004, hearing and detailed above. The arrangement proposed by this Court would require a protective order under which counsel for Petitioners would be required to treat all information they received from Petitioners as confidential, in order to avoid the monitoring provisions of the Government's proposed procedures. In the event that counsel intended to disclose anything in connection with this case, counsel would be required to permit the Government to review for classification purposes

whether such information is in fact confidential, or whether it is appropriate for disclosure. [FN18] The Rules of Professional Conduct, read in conjunction with such a protective order, and having identified all information as confidential (in the absence of the Government's proposed monitoring procedures), would subject counsel to any and all penalties for disclosure.

> FN18. If the privilege team determines that the information "reasonably could be expected to result in immediate and substantial harm to the national security," which presumably counsel did not perceive, the information can be disseminated to the appropriate authorities. Gov't Resp. Ex. A at 7.

III. CONCLUSION

*11 After careful consideration of the parties briefs' and the relevant law, the Court finds that Petitioners are entitled to be represented by counsel. The federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651, operate together to create this entitlement. In light of this holding, the Court further determines that the Government's proposed real time monitoring and classification review procedures for legal mail and attorney notes impermissibly burden the attorney-client relationship and abrogate the attendant attorney-client privilege.

The Court has proposed a framework, under which counsel for Petitioners would be allowed unmonitored access to their clients and unreviewed written notes and legal mail so long as they agree to treat all information obtained in the course of Petitioners' representation as classified. The Court finds that this alternative framework would sufficiently address the Government's national security concerns, while retaining the protections that accompany Petitioners' representation by counsel. Accordingly, the Court shall deny the Government's proposal to impose these conditions on Petitioners' access to counsel, contingent on Petitioners' compliance with the Court's proposed framework.

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 20th day of October, 2004, hereby

ORDERED that the Government's motion [46] to conduct real time monitoring of meetings between counsel and Petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi, and to conduct a classification review of notes taken during these meetings and of legal mail sent between these Petitioners and counsel is DENIED, contingent on Petitioners' compliance with the framework set out by the Court at the August 16, 2004, hearing, and to which Petitioners agreed.

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